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No. 91-672

In The

Supreme Court of the United States

October Term, 1991

NEW YORK CITY HEALTH AND HOSPITALS CORPORATION; HARLEM HOSPITAL CENTER; COLUMBIA UNIVERSITY COLLEGE OF PHYSICIANS AND SURGEONS; and DR. R. LINSY FARRIS,

Petitioners,

vs.

DR. IFEOMA EZEKWO,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

Page

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STATEMENT OF THE CASE

Both courts below agreed that respondent, Dr. Ifeoma Ezekwo, had a property right in the position of chief resident

(A7, 42-48). Contrary to petitioners' suggestion, that property right was solidly based on petitioners' own persistent practices, the express representations petitioner Harlem Hospital Center (HHC) made to the respondent (JA35-36) and the brochures which HHC published and disseminated to prospective residents (JA36, 150, 492, 503), including respondent, who reasonably relied upon such representations.[1]

Each department resident served as chief resident until Dr. Ezekwo's turn in November 1987 (JA76, 337-338). HHC had no standard which residents had to meet prior to such service. Acceptance in the residency training program qualified physicians for this service (JA76). However, after Dr. Ezekwo criticized the residency program, its director, Dr. Farris, and some of the attending physicians, she was denied this tangible benefit.

Petitioners' suggestion that Dr. Ezekwo received any form of due process — either before or after this deprivation — is entirely baseless. On the contrary, in June 1987, resident coordinator Delerme told respondent that she *would* serve as chief resident commencing November 1, 1987 (JA72-76).

In August 1987, Dr. Farris discussed with the attending physicians whether Dr. Ezekwo should be permitted to serve as chief resident (JA163-164). This atypical discussion (JA166) did not involve any alleged academic failures, but, rather focused on

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1. While petitioners contend that nothing in these written materials "guaranteed" respondent that she would serve a stint as chief resident, the Ophthamology Department's Housestaff Manual, published in June 1987, unequivocally states: "The residency staff is composed of nine residents, three at each of the year levels of training. In the third year, four months are spent as chief resident." (JA492). THe HHC brochure which respondent received and relied upon in applying to the program in 1981 contains precisely the same statement (JA503).

Dr. Ezekwo's allegations against the department, the director and some of the attending physicians. At this one meeting, the attending physicians did not reach any substantive conclusion, but confirmed Dr. Farris' authority to handle Dr. Ezekwo as he saw fit (JA168).

At no time did Dr. Farris as much as speak with Dr. Ezekwo about the memoranda she wrote concerning the department during the summer of 1987, her OKAP scores or her allegedly deficient surgical skills (JA99, 159). Neither Dr. Farris nor Dr. Delerme ever suggested that these matters, taken together, or any of them individually might cause even a reconsideration of her projected stint as chief resident, let alone deprivation of this right. *Id.*

In short, the courts below properly held that HHC created a property interest in the position of chief resident; that Dr. Ezekwo was one of a number of beneficiaries of this entitlement and that petitioners violated the Due Process Clause in terminating her entitlement without *any* modicum of due process.

As the courts below properly resolved the first issue (the existence of a property right) and the Court of Appeals for the Second Circuit properly adjudicated the second (the absence of required due process), this Court should deny petitioners' petition for a writ of certiorari.

STATEMENT OF FACTS

Respondent next addresses only factual errors or distortions which petitioners have included in their statement of facts.

1. Dr. Farris sponsored Dr. Ezekwo for the HHC residency program. He wrote positive letters of reference for her based on their pre-residency contact. His initially favorable attitude toward respondent was based on his own positive personal experiences,

not some abstract or uninformed hope that she would or could succeed in the program (JA449, 450).

2. The chief resident develops the on-call schedule for the other residents and assigns them cases when he is on call, often giving himself the most challenging patients (JA104, 599). In this manner, each third-year resident self-assigns a sufficient diversity and quantity of surgical cases to meet the requirements imposed by the national accrediting agency (JA576-579).

3. HHC assured each resident that (s)he would serve as chief resident during his/her third year. This practice was in place as early as 1973 (JA149) and certainly in 1981, when Dr. Ezekwo first expressed interest in the program (JA35-36).

4. Serving as chief resident is a qualification considered by physicians in awarding post-residency fellowships (JA260). This is particularly true here, where HHC had an established practice of having everyone serve as chief resident and where deprivation of that right naturally raised serious questions as to a candidate's worthiness.

5. Dr. Ezekwo's memoranda to the program director, Farris, were not widely circulated by her, but rather written to the person responsible for operating a failing program, one on probation with the accrediting agency for deficient staffing and course offerings (JA238-239). The memoranda mentioned attending physicians only to the extent that respondent claimed — in specific and cited cases — that they had engaged in egregious and proscribed conduct, contrary to program regulations. The memoranda were not, as petitioners portray them, unguided missives aimed at attacking others. Specifically:

(a) Dr. Ezekwo repeatedly reported to Dr. Farris that some attending physicians, paid from the public fisc, were not appearing,

as scheduled, to cover clinical or surgical responsibilities, thereby rendering the public health clinics unable to serve patient needs (JA69, 444-445); (complaint that Dr. Bansal had failed to timely attend to clinical responsibilities (JA460-462); (noting Dr. Rice's failure to cover Sydenham Clinic on June 12 and 26, 1987) (JA475-476, 554); (complaining that Dr. Tiwari wished to leave the clinic early on Wednesdays, his scheduled cover day) (JA540); (noting Dr. Bansal's failure to cover the glaucoma clinic for assigned hours) (JA541); (reporting Dr. Delerme's tardiness for coverage at Sydenham Clinic).

(b) Dr. Ezekwo noted that the equipment available at Harlem Hospital Center was regularly dysfunctional (JA71, 74), again detrimentally affecting patient care, as well as the proper training of residents (JA447, 463, 465-466, 471-472, 538).

(c) Dr. Ezekwo also reported that the program was failing to provide residents with the training they were supposed to receive (JA443-444, 463-464) and that scheduled morning rounds did not occur (JA454).

6. By and large, Dr. Farris found Dr. Ezekwo's reports well-founded and true. But, he was unable to clean up the department and became frustrated with respondent. He yelled at her inappropriately (JA52) and later apologized for his outbursts (JA434) ("I apologize for any ungentlemanly behavior and can only explain it as a reaction to many of the inefficiencies and inconveniences that we all suffer during patient care at Harlem Hospital . . ."). Dr. Farris deprived Ezekwo of the chief residency to punish her for telling the truth about the sad state of the residency program and the department.

7. The department rated residents twice each year. In June 1987, Farris and Delerme rated Ezekwo better than average in overall performance (JA550-553). This occurred *after* HHC had

received the 1987 OKAP scores. Thereafter, Delerme told Ezekwo that she would serve as chief resident starting in November 1987 (Ja72-76). Nor did Farris or Delerme confront respondent with any accusation thereafter made against her (JA256-257). Neither Farris nor Delerme ever intimated or indicated (in any way) that Ezekwo was in danger of losing her chance to serve as chief resident (JA183). Respondent learned this only after Dr. Solomon had scheduled a meeting after November 1, 1987 and made clear that he was to continue to serve as chief resident. Unlike plaintiffs in most cases petitioners cite, this respondent had no notice, let alone any opportunity to contest, the deprivation of rights petitioner visited upon her.

8. As other residents, Dr. Ezekwo was to gain the bulk of her surgical experience and training during the last year of her residency. Contrary to petitioners' current contention that respondent's poor surgical skills resulted in the decision to deny her the chief residency, at trial Dr. Farris testified that as of September 1987, respondent had "average" surgical skills (JA180). Moreover, during her second year, respondent had been denied usual surgical training and Dr. Farris knew about this (JA46-47).

9. In September 1987, several attending physicians, including Farris, wrote supportive letters of reference as Dr. Ezekwo applied for fellowship programs (JA484-485, 573-575). The contents of these letters belie the existence of any widespread animosity between Dr. Ezekwo and the attending physicians. Moreover, head nurse Rance testified at trial that Dr. Ezekwo performed well and had consistently fine relationships with patients and fellow staff (JA289).

10. The October 16, 1987 meeting, at which Farris decided to deprive Ezekwo of her chief residency, was a conference concerning the pending internal equal employment opportunity charge respondent had filed against Farris. Dr. Ezekwo was not

present, but, instead, Farris met with high-ranking administrators from Columbia University and Harlem Hospital (JA456). In retaliation against respondent's filing of the EEOC charge and out of frustration with her legitimate and factual complaints about the department, Farris first proposed dropping respondent from the three-year residency program. He later determined to deny her the promotion which the chief residency position represented. While Farris justified this decision by reference to Ezekwo's speech and conduct, he never so much as confronted her about any such matter, either personally or in written form (JA183).

11. The October 1987 "change of policy" memorandum contained no standards for the selection of a chief resident, but was instead a unilateral change in department rules intended to cover the denial to respondent of her promotion (JA459). Nor did the department later adopt any specific standards or measures for the selection of chief resident.

REASONS FOR DENYING THE WRIT

1. Both the district court and the Court of Appeals correctly held that respondent had a property interest created by petitioners' own past practices and written publications. These sources provided Dr. Ezekwo with a "legitimate claim of entitlement" to the position of chief resident. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). This finding of fact should not be disturbed here.

2. The district court properly rejected petitioners' suggestion that Dr. Ezekwo's was a "unilateral expectation" rather than an entitlement.

> Before applying for the position, plaintiff read the brochure describing the procedure whereby each of the residents would be chief resident during their

> third year in the program. Plaintiff had more than a unilateral expectation of being the chief resident; the position was offered to applicants as consideration for applying for the position. Plaintiff clearly had a right to expect that defendants would live up to their offer of the appointment. Consequently, she did have a property interest in being appointed to that position.

(A8).

Similarly, the Court of Appeals noted that parties "through their conduct and practice can create additional rights and duties" which are not specified in a written contract (A43). Here,

> HHC adopted a policy and practice of awarding the position of chief resident to all third year residents on a rotating basis. This method of selection was not haphazardly applied; it was an established practice which was expressly highlighted in HHC's informational documents . . . It is plain that this practice predated Ezekwo's admittance to the program and continued while she was there. Ezekwo's expectation of obtaining the position was further enhanced when she was verbally advised in June 1987 that she would be chief resident from November 1987 through February 1988.

(A47).

This course of conduct "created a contractual right that rose to a level of a significant property interest that would be protected under state law." *Id.*

4. In short, even accepting petitioners' formulation that nothing less than employment itself constitutes a property interest, respondent *was* denied the distinct and specific position of chief resident, one undeniably superior in salary, prestige and responsibilities to that of resident. While this case is *not* about the termination of respondent's residency, it is about the denial of elevation to an indisputably higher and promised position without any modicum of due process whatsoever.

In this light, analogizing Ezekwo's interest in this new position, which carried financial and less tangible advantages (A48), with deprivations of much more trivial job-related benefits is, as the Court of Appeals concluded, "unpersuasive" and faulty.

5. Petitioners suggest that the decision below conflicts with opinions rendered by other Circuits, creating a division of authority which this Court should resolve.

To the contrary, petitioners have presented no such conflict. The nature of due process analysis will inherently lead to fact-intensive weighing of rights and interests and, consequently, different due process rights will be accorded to their holders. This Court cannot review each such case nor do any more than provide general guidance as to the nature of claims to be afforded constitutional protection and the kinds of protection which ought be provided.

Critically, petitioners have not suggested that the Second Circuit opinion conflicts with *any* guidance provided by this Court's precedents. And, the conflicts petitioners invent with other Circuits simply do not exist.

In one line of cases, petitioners cite to, the district and appellate courts expressly found, unlike here, that plaintiffs had no protected entitlement or, to put the matter another way, lacked

an entitlement both recognized by state law or practice and of sufficient moment to warrant constitutional recognition. For instance, in *Greenberg v. Kmetko,* 840 F.2d 467, 475 (7th Cir. 1988), the Seventh Circuit repeated its prior-expressed reluctance "to find a transfer [of a state employee] to the same pay level to be a violation of the Fourteenth Amendment." *See Parrett v. City of Connersville,* 737 F.2d 690, 693 (7th Cir., 1984), *cert. dismissed,* 469 U.S. 1145, 105 S. Ct. 828, 83 L. Ed. 2d 820 (1985). This principle presents no conflict with that applied by the Second Circuit below. Dr. Ezekwo did not claim that a lateral transfer deprived her of a property interest triggering due process protection. Rather, her interest was in a superior position, with both tangible and intangible advantages.

Likewise, in *Dorsett v. Board of Trustees,* 940 F.2d 121 (5th Cir. 1991), the plaintiff, an aggrieved university professor, was not terminated or deprived, as respondent was here, of any entitlement or promotion to which he had a right. Rather, he claimed that the university harassed him by failing to accord him certain discretionary benefits which the Fifth Circuit characterized as "relatively trivial". As Dorsett was *not* deprived of any property right, but rather denied discretionary advantages, his claim is not comparable to that adjudicated here. Accordingly, the decision of the Fifth Circuit does not conflict with the one rendered below[2].

Similarly in *Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983), the Seventh Circuit affirmed the district court's holding that a sheriff's failure to pay promised overtime salary was not a deprivation of property sufficient to trigger due process protection. *Brown* involved an administrative decision required by a shortfall

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2. Nor do petitioners fairly represent this holding when they describe the deprivations Dorsett alleged as "contractual employment benefit". The Fifth Circuit described "various administrative decisions" which denied certain benefits to Dorsett, but never found that plaintiff had any entitlement to these. *Id.* at 123.

in funds, not specific dissatisfaction with the performance of one or another subordinate. The sheriff did deprive his deputies of accrued compensatory time, but due process protections were not extended because of the generalized nature of the injury and its uncontested financial justification. This logic is consistent with that applied by the Second Circuit here, not conflicting.

In another line of cases which petitioners claim raises a conflict with the decision below, the aggrieved parties had protected rights and, unlike respondent, were provided sufficient and real pre-deprivation notice and hearings. *See Carter v. Western Reserve Psychiatric Habilitation,* 767 F.2d 270, 273 (6th Cir. 1985)[3]. Such cases present no conflict with the decision below.

6. As shown above, the Second Circuit correctly held that petitioners' own conduct and practice created more than a unilateral expectation of entitlement in the position of chief resident. It also and separately concluded that the position of chief resident represented a "significant professional value" to respondent not merely, as petitioners distort, because of the increment in salary associated with it (A48). Rather, the position of chief resident represented the culmination of a person's medical training and was an important credential as the physician sought fellowships and hospital appointments (A11).

When petitioners contend that the decisions below "did not

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3. Other appellants in *Carter, supra,* complained that a two-day disciplinary suspension deprived them of protected rights without due process. The Sixth Circuit agreed that "in theory" this discipline constituted a "property deprivation" (at 272, n. 1), but held that it was an instance of "routine discipline" causing a *de minimis* deprivation "not deserving of due process consideration". *Id.* This reasoning does not apply here as Ezekwo was *not* disciplined in a routine manner, but denied a once-in-a-lifetime opportunity with consequences for her career.

establish its importance at all'' (Petition at 33), they invite this Court's review of findings of fact, not an appropriate reason for seeking the exercise of this Court's jurisdiction.

7. Accepting, as this Court should, that Dr. Ezekwo had an entitlement to the position of chief resident and that this position had ''significant professional value'' to her, this Court should not engage in the micro-management of Circuit decisions weighing the due process protections which ought be accorded before the deprivation of quite different rights. Petitioners suggest that other Circuits have found that certain contractual rights do not trigger due process protection and that the Second Circuit's conclusion that denial of chief residency does require some pre-deprivation process conflicts with these.

However, the decision below does not conflict with either *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) or *Regents of the University of Michigan v. Ewing*, 474 U.S. 214 (1985). In *Loudermill, supra*, at 542, this Court required the public employer to provide pre-termination notice and the opportunity to be heard before discharge. In *Ewing*, the Court found that the due process provided sufficed to satisfy constitutional standards. Neither case conflicts with the decision below.[4]

Nor does the decision below conflict with *Unger v. National Residents Matching Program*, 928 F.2d 1392 (3d Cir. 1991) in

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4. Petitioners suggest that if remaining in a degree-granting program is a dubious property interest then the claim to have a property right to serve in a promised chief residency position is ''utterly baseless''. But, this argument ignores the fact that Ezekwo was an *employee*, not merely a student. She was paid by the state to perform medical services, as she completed her own training. She was denied an employment opportunity of significant professional value not for academic reasons, but because of other alleged deficiencies which could well have been the subject of pre-deprivation notice and review.

which the Third Circuit affirmed the district court's grant of Temple University's motion to dismiss a claim brought by a prospective medical school resident precluded from attendance due to the university's elimination of the program which had admitted her. Unger argued that by discontinuing its entire dermatology residency program after her admission, Temple denied her procedural due process in violation of 42 U.S.C. § 1983. *Id.* at 1395.

The Third Circuit noted that in *Regents of Michigan v. Ewing, supra,* and *Board of Curators v. Horowitz,* 435 U.S. 78, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978), this Court "assumed without deciding that students currently attending school had a property interest in the continuation of their education." *Id.* at 1397. As Unger was not yet an enrollee, the Third Circuit reasoned, these cases did not assure her of any procedural rights. The Court of Appeals likewise rejected Unger's claim that before it could break its contract with her, Temple needed to accord her procedural due process and held, instead, that not every breach of contract by a state actor rises to the level of a constitutional deprivation.

In so holding, the court expressly recognized two kinds of contract breaches which do warrant constitutional protections: "the first type arises where the contract confers a protected status, such as those 'characterized by a quality of either extreme dependence in the case of welfare benefits, or permanance in the case of tenure, or sometimes both, as frequently occurs in the case of social services'," citing to *S&D Maintenance Co. v. Goldin,* 844 F.2d 962, 965-67 (2d Cir. 1988); the second arises "where the contract itself includes a provision that the state entity can terminate the contract only for cause." *Id.* at 1399.

Here, the district court correctly held that, upon admission to the residency program, Ezekwo was granted the unequivocal right to serve as chief resident. As Judge Metzner held, "[P]laintiff

had more than a unilateral expectation of being Chief Resident; the position was offered to applicants as condition for applying for the position. Plaintiff clearly had a right to expect that defendants would live up to their offer of the appointment." (A8). The Court of Appeals held that this right could only be deprived after petitioners provided respondent notice of any new criteria they intended to impose as qualifications for service as chief resident and the opportunity to show that either she met the new criteria or that they should not apply to defeat her settled expectation (A57-58). The nature of Ezekwo's contractual entitlement differentiates her claim from that advanced by Unger who did not allege in any manner that Temple's contract allowed it to cancel its dermatology residence program only for cause. *Id.* at 1399.

Other cases cited by petitioners are even less apposite. In *Todorov v. DCH Healthcare Authority*, 921 F.2d 1438, 1443-44 (11th Cir. 1991), before denying a neurologist radiology privileges, the hospital afforded him ample opportunity to argue his case before the relevant review committees. Moreover, as the Eleventh Circuit held, the hospital's denial of his application for additional privileges did not abrogate any extant contractual right Todorov possessed. *Id.* at 1463. As it concluded, "Dr. Todorov does not claim any contractual right in additional privileges; he only alleges a contractual right in the standards DCH uses to grant privileges. If, however, there is no protected interest in the privileges, due process requirements will not delineate the procedures used to grant or deny these privileges." *Id.* at 1463-64.

As both courts below held that Ezekwo's contract assured her the right to serve as chief resident, *Todorov* is wholly inapposite and not a source of conflict with the opinion below.

Finally, *Faucher v. Rodziewcz*, 891 F.2d 864 (11th Cir. 1990) does not establish any principle contrary to that relied upon below.

As the Eleventh Circuit held, Faucher had no employment contract with the hospital or with the defendant which guaranteed her anything, *id.* at 869, and thus no basis for a claim that changing the manner of assigning anesthesiology cases deprived her of any protected interest. Staff privileges alone do not amount to such a contract. *Engelstad v. Virginia Municipal Hospital,* 718 F.2d 262, 267 (8th Cir. 1983).

9. The decision below does not conflict with any of the cases cited above nor with *Board of Curators of the University of Missouri v. Horowitz,* 435 U.S. 78 (1978). In short, the reasoned approach of the Second Circuit persuasively distinguished the instant case from *Horowitz,* where the *student* in question was fully apprised of her failure to meet academic standards and dismissed only after numerous counselling efforts failed to yield satisfactory performance.

In its decision below, the Second Circuit showed the clear inapplicability of *Horowitz* here. It emphasized the following differences:

1. The "academic" standards which petitioners invoked here were "eleventh hour" criteria, not longstanding academic requirements which the institution had long upheld. Indeed, "[t]hese new critera were not made known to residents in the program until after the final decision on Ezekwo had been made." (A56).

2. Moreover, petitioners never elaborated these new standards and this, combined with the timing of their articulation, "casts some doubt on the truly "academic" nature of the decision here (A53).

3. Ezekwo was provided with absolutely no notice that her academic performance was deemed inadequate or jeopardized her

service as chief resident. Indeed, at her last rating in June 1987, Farris and Delerme informed her that her performance was above average. On the contrary, as the Second Circuit noted, in *Horowitz*, "the medical student, prior to her dismissal from the program, had been advised of the faculty's dissatisfaction with her clinical progress and informed that these problems could jeopardize her continued participation in the program." (JA54). As the Court of Appeals explained the distinction, ". . . the institution in *Horowitz* had long established academic criteria and repeatedly had advised the student involved that her performance was not meeting these standards, and that if it did not improve, would prevent her from continued enrollment. Such is not the situation presented here."

4. The residency program is "an employment relationship" as well as an academic undertaking. This characteristic also distinguishes the instant case from *Horowitz*, where the student had no unequivocal guarantee to a particular entitlement like service as chief resident.

Against these distinctions, petitioners still contend that *Horowitz* is controlling here. This position is simply baseless and does not recognize the significance of the critical differences noted above. While the district court found the deprivation here to be "academic in nature", upon review, the Second Circuit concluded that this finding was dubious at best and that the decision was one of mixed nature — at least in part disciplinary.

The post-*Horowitz* cases which petitioners cite do not stand in conflict with the decision below and, indeed, support it. In *Hankins v. Temple University*, 829 F.2d 437 (3rd Cir. 1987), the residency program provided the physician explicit notice that her performance was deficient and would, if not improved, cause her separation from the program. Moreover, upon being informed for the second time of her deficiencies, Dr. Hankins "left the

hospital, leaving her patients unattended." *Id.* at 439.

These salient facts distinguished *Hankins* from the instant case where Dr. Ezekwo never received *any* warning that her alleged academic deficiencies were jeopardizing her service as chief resident and never took any action which in the least threatened patient safety.

Critically, as the Third Circuit noted in *Hankins,* before dismissal from a program, *Horowitz* required at least "an informal-give-and-take" between the student and the administrative body. That is all the Second Circuit required below. But, unlike *Horowitz* and *Hankins,* no such notice or informal give-and-take occurred here. Instead, petitioners kept Dr. Ezekwo in the dark concerning her status until an "eleventh hour" change in standards which were not even announced until after the deprivation of respondent's rights.

Finally, petitioners' suggestion that the June 1987 meeting at which respondent was advised of her satisfactory performance satisfied procedural due process is nothing short of absurd (Brief at 47). To the contrary, as petitioners ultimately concede, they afforded respondent no pre-deprivation or post-deprivation process and this conduct clearly violated the Due Process Clause.

CONCLUSION

WHEREFORE, the petition for a writ of certiorari should be denied in all regards.

Respectfully submitted,

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